Supreme Court, U.S.
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In the
Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

ANGELA RUIZ,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

JOHN T. PHILIPSBORN
Counsel of Record
Law Offices of John T. Phillipsborn
507 Polk Street, Suite 250
San Francisco, CA 94103
(415) 771-3801

Counsel for *Amicus Curiae* CACJ

DAVID M. PORTER
Co-Chair, NACDL
Amicus Committee
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

Of Counsel

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INTERESTS OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors.[1] Two of NACDL's chief objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. Because the Government of the United States is taking the position that the Ninth Circuit's decision in *United States v. Ruiz* should be overturned – a decision that bears in part on the meaning of this Court's decision in *Brady v. Maryland*, 373 U.S. 83; 83 S.Ct. 1194 (1963) – NACDL respectfully submits this brief as an amicus curiae in support of Respondent Ruiz and the Ninth Circuit's decision.

California Attorneys for Criminal Justice ("CACJ"), an NACDL affiliate, is the largest organization of criminal defense lawyers in California. Its membership includes both public defenders and privately employed criminal defense lawyers. In the past twenty-five years, CACJ has appeared as *amicus curiae* in this Court and in other courts throughout the United States in cases important to the administration of justice. CACJ expressed its interest in the issues currently under review in this Court by appearing in the Northern District of California in one of the first cases in which a so-called "*Brady* waiver" had

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1. Letters of consent have been filed with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or part and no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

been negotiated by the Office of the United States Attorney for the Northern District of California. In addition, members of CACJ, in their role as lawyers defending cases in the federal and state courts in California, have repeatedly urged respect for the *Brady* rules.

SUMMARY OF ARGUMENT

The Government has argued below, and now again before this Court, that a prosecutor's obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), to disclose exculpatory evidence to an accused who elects to go to trial does not apply when an accused elects to plead guilty. The Government takes the position, in the alternative, that if *Brady* does apply in a case involving a guilty plea, then the accused who pleads guilty can waive the right to disclosure of *Brady* materials and thereby disencumber the prosecutor of any *Brady* obligation. *Amici* contend that either of the Government's alternative positions, if adopted by this Court, would significantly obstruct the truth-finding and justice-dispensing functions of our courts, permit prosecutors to act in ways directly contrary to their charge to see that justice is done, and thereby serve to undermine the public's confidence in the operation of our criminal justice system.

Amici are criminal defense lawyers engaged day-to-day in battles with prosecutors. In defending the criminally accused, *amici* play a key role in an adversarial justice system designed to achieve just results by a carefully regulated clash of opposing parties before an impartial judicial officer. The legitimacy of this system stands or falls on the implementation of and compliance with rules and principles that optimize the probability of

fair and accurate adjudications and sentences.

Amici contend that the rule of *Brady*, as correctly interpreted by the United States Courts of Appeals for the Second and Ninth Circuits to apply to guilty plea as well as trial cases, is critical to maintaining the legitimacy of our criminal courts in two ways. First, by deterring prosecutorial withholding of exculpatory evidence, the rule serves to minimize the number of wrongful convictions or sentences. Second, the rule affords appellate courts both the opportunity and ability to redress wrongful convictions and sentences.

Amici will not reiterate the points Respondent Ruiz will ably place before this Court in support of maintaining the *Brady* rule's proper scope and force. Rather, *amici* seek to direct this Court to the practical side of this dispute – the significance of the *Brady* rule within the framework of an adversarial system where there is room for abuse by litigators competing to win. Cases that have reviewed *Brady*-related issues provide compelling evidence that any contraction or dilution of the *Brady* rule will diminish not only the integrity of our criminal justice system but also its legitimacy.

The provenance and context of the *Brady* rule is the guarantee to an accused of a just process, in which the the Government has a non-deligable duty to see that justice is done. Even before *Brady*, in *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340 (1935), noting that an adjudication of guilt at trial is dependent on the presentation of truth, the Court held that where the prosecution knowingly contrives a conviction through deception, the conviction, and the resulting punishment, are "inconsistent with the rudimentary demands of

justice. . ." In *Brady*, the Court stated that in our system the prosecutor plays "the role of an architect of a proceeding" - and where that architect fails to disclose information that bears on the truth of the matter, he or she contributes to an adjudication that "does not comport with standards of justice . . .." *Brady*, 373 U.S. at 88, 83 S.Ct. at 1197. Because the prosecutor is a representative of a sovereignty, and because the ultimate objective of the sovereign is to see that justice is done, the prosecutor must seek that ultimate objective. *United States v. Bagley*, 473 U.S. 667, 676 n.6, 105 S.Ct. 3375 (1985).

From this Court's first definition of the *Brady* rule as a constitutional obligation of prosecutors and an inherent or structural component of due process, this Court has held that the obligation exists throughout the life of a case, applying not only to adjudication of guilt but also to sentencing, and into the post-conviction litigation. Indeed, the issue in *Brady* itself was the prosecutor's duty with respect to exculpatory evidence material to the sentencing of the defendant. Yet in this case, the Government contends that there is a point at which the prosecutor's obligation to provide evidence that "would tend to exculpate [the accused] or reduce the penalty" lapses. According to the Government, that point is reached in one of two ways: first, if the accused elects to plead guilty rather than go to trial, the obligation is extinguished by operation of law; or, if the accused pleads guilty and in doing so waives his or her right to *Brady* materials, the obligation dissolves by contractual agreement. Under either alternative, the Government's position, if adopted, would subvert the criminal court's truth-finding function in adjudicating guilt and the court's justice-dispensing function with regard to fact-finding and fact-based sentencing after conviction.

In an accusatorial system such as ours, the prosecutor's obligation of disclosure is a fundamental, structural component of the administration of criminal justice. The courts have to trust that the executive will discharge its obligation of disclosure to ensure the integrity of the proceedings, and, where material omissions occur, use the *Brady* rule to repair the damage in appellate proceedings designed for just that purpose.

ARGUMENT

I. The Prosecutor's Obligations of *Brady* Disclosure Are Central to the Integrity of Our Adversarial Process; Without Them, a Major Safeguard of Our Justice System's Integrity Falls by the Wayside.

Our legal tradition has deep roots. Important aspects of our common law tradition "emerged in the first century and a half following the Norman Conquest."[2] One of the differences between the so-called inquisitorial model rooted in the post-Napoleonic era French system and our adversarial form of adjudication is that in our system courts are not involved in supervising and conducting the investigative phase of the process.[3] Here, the police, and prosecution, investigate and the prosecutor then initiates the criminal case charging process. Thus, until adjudication, our courts do not know what evidence has been disclosed during the

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2. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 220 (Oxford University Press, 2000).

3. Henry J. Abraham, *The Judicial Process* 98-100 (Oxford University Press, 6th ed. 1993).

investigation. It is the prosecutor who possesses the fruit of his investigation, sharing it largely at his discretion (but subject to the *Brady* rule), and then, in the cauldron of adversarial trials, participates in the adjudication of the facts. Counsel for the accused also investigates when the adjudicative process begins, though often with significant limitations caused by the asymmetry of our process. This asymmetry exists because, with few exceptions, the prosecutor already has investigated and built up a case at least to the level of probable cause before defense counsel becomes involved. Given this imbalance between adversaries, and the overriding goals that the truth emerges and justice is done, the prosecutor is expected to reveal information to defense counsel that, if used competently, may make a significant difference either in the adjudication of guilt or in the facts related to sentencing decisions.

Since this Court's decision on *Mooney v. Holohan*, supra, the rule has been that where the prosecution knowingly uses perjured testimony, such a "contrivance by a state to procure the conviction" is inconsistent with justice. 294 U.S. at 112-13. Courts have therefore assumed that, "if it is established that the government knowingly permitted the introduction of false testimony 'reversal is virtually automatic.'" *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (quoting *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975)).

In a series of cases prior to *Brady* involving either perjured testimony, or prosecutorial suppression of evidence that would have demonstrated the falsity of trial testimony, this Court sought to maintain the integrity of the process. For example, in *Alcorta v. Texas*, 355 U.S. 28, 31, 78 S.Ct. 103 (1957), a prosecutor instructed

a witness to withhold evidence about his relationship with the decedent, resulting in a mistaken impression about the nature of the accused's participation in the charged crime. This instruction was deemed significant to the integrity of the proceeding, and the acceptability of the result. Similarly, in *Pyle v. Kansas*, 317 U.S. 213, 215-16, 63 S.Ct. 177 (1942), this Court held that a habeas petitioner is entitled to freedom when his imprisonment was obtained through the State's knowing use of perjured testimony.

After *Brady*, in *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392 (1976), this Court observed that it had "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

In *Nix v. Whiteside*, 475 U.S. 157, 168-69, 106 S.Ct. 988 (1986), this Court declared that a lawyer who presents perjury on behalf of a defendant commits an illegal act. The *Nix* Court noted that the Canons of Professional Ethics of the American Bar Association and the Model Code of Professional Responsibility impose on all lawyers the duty to prevent and disclose frauds. More recently, with respect to prosecutors, the Ninth Circuit put the point succinctly: "A prosecutor has a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000).

Recently, a prosecutor put before the jury the testimony of an accomplice against the accused without disclosing to the defense the existence of a letter

implicating the accomplice and others in a plot to frame the accused. *Commonwealth of the Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1111-14 (9th Cir. 2001). The reviewing court concluded that the Government's failure to discover the origin of the letter aided in the commission of a fraud on the trial process. Reflecting on the realities of our criminal court system, the Ninth Circuit noted that "each contract for testimony [by a Government witness] is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to 'get' a target of sufficient interest to induce concessions from the government." Id. at 1124. In reversing the conviction, the court noted that recent studies had demonstrated that in approximately one out of five cases involving DNA-exonerated defendants, the defendants had been inculpated by an accomplice's or informant's testimony. Id. at 1124 n. 6.[4] Thus, there is a lengthy history of judicial intolerance for governmental tinkering with the integrity of the process through the introduction of false, contrived, or misleading evidence.

When prosecutors do not disclose such information, they compromise the integrity of the proceedings: the fact-finding process at trial and at sentencing, and review by a higher court. Regrettably, there are times when an individual prosecutor may forget or ignore "the ethics of his office" and fail to disclose *Brady* information. *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976). There are also times when a prosecutor will seek to win a case by intentionally hiding material impeachment evidence from defense counsel.

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4. The court referred in passing to the now well-known book *Actual Innocence* by Barry Scheck, Peter Neufeld, and Jim Dwyer.

For example, in *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979), by intentionally concealing impeaching evidence as described in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972), the prosecutor negotiated a deal with the accomplice's attorney that was kept secret from the accomplice. In exchange for testimony, the accomplice would receive a reduced prison term. At the prosecutor's behest, the accomplice's attorney did not reveal the terms of the deal but merely assured his client that if he testified, "everything would be all right" and that "there were things going on that it would be better for him not to know." Id. at 6. Thus, when the accomplice was cross-examined as to any benefits he received or was promised for his testimony, he denied any such deal and stated that he was just doing his "civic duty." Id. The Fourth Circuit granted Campbell's habeas petition, holding that the prosecutor's failure to correct the accomplice's unwittingly false testimony violated due process. Id. at 7.

Sadly, such prosecutorial misconduct continues despite appellate court decisions such as *Campbell*. In *Singh v. Prunty*, 142 F.3d 1157 (9th Cir. 1998), for example, the prosecutor kept from the defense information regarding benefits conferred on its major witness. In *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), the Ninth Circuit reversed a conviction because the Assistant United States Attorney concealed *Brady* information and a cooperation agreement with a material witness-informant, and continued the scheme on appeal.

Prosecutors will no doubt contend that what distinguishes guilty pleas from trial convictions with regard to the *Brady* rule is that a guilty plea is an

absolutely reliable guarantee that the guilt adjudication is correct. Not so. Some accuseds who are completely innocent of crimes (or at least innocent of the charges against them) nevertheless plead guilty for any number of reasons.

Amici have reviewed two recent cases which serve to demonstrate the pitfalls of adjudications arrived at through guilty plea. In 1992, John Dixon pled guilty to first degree kidnapping; first degree robbery; two counts of aggravated sexual assault; and possession of a weapon in the third degree, and was sentenced to approximately 45 years in prison.[5] Dixon eventually worked with post-conviction lawyers who encouraged retesting of biological material through use of technology that would allow DNA analysis not only of the original case evidence, but also of samples obtained during post-conviction litigation. The New Jersey State Laboratory retested the biological material, and found that Dixon could not have been the source of sperm collected from the victim - though the victim had identified Dixon's picture as that of her assailant, and had identified Dixon during the investigation and related proceedings. In 2001, Dixon was exonerated, and his convictions vacated.

In 1988, Christopher Ochoa and a fellow employee at a Pizza Hut in Austin, Texas were arrested and questioned about a murder and sexual assault. Ochoa

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5. His convictions were based on investigations by the Irvington Police Department in New Jersey. The original case against him, *State of New Jersey v. John Dixon*, was trial court no. 90-54573. Post-conviction litigation occurred in the New Jersey state courts in appeals case no. 2683-5-91.

eventually confessed, and implicated his codefendant Danziger. He agreed to plead guilty and to testify against his co-defendant. He did so, implicating himself in the sexual assault on the victim, and in her killing. Both Ochoa and his co-defendant received life sentences. Some years later, another prisoner wrote to the office of the Governor, and to the prosecution, claiming to be puzzled at the incarceration of both Ochoa and his co-defendant, since he [the other prisoner] believed he had committed the crimes for which they had been convicted. A reexamination of the pertinent physical evidence demonstrated that Ochoa was not the donor of the biological material gathered during the investigation. Ochoa was set free, having served 12 years on the sentence imposed as a result of his guilty plea.[6]

Admittedly, neither of these cases illustrates a failure of pre-plea disclosure by a prosecutor intentionally "sitting" on exculpatory evidence. However, they are examples of the recent spate of reversals, vacated convictions, or pardons, based on post-conviction review of physical evidence through new technologies. As we shall see in the next argument, however, there are reported cases in which the negotiations between the parties, and the eventual sentence imposed as a result of a negotiation, were tainted by prosecutorial withholding of impeaching evidence. The point here is relatively simple. Our system of adjudication does not 'guarantee'

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6. *State v. Ochoa* was reviewed under the title *Ex Parte Christopher Ochoa* by the Texas Court of Criminal Appeals. The trial court adjudication of post-conviction petition review occurred in January, 2001 in case 96-538-A; the Texas Court of Appeals issued its order for post-conviction relief in case 74-246.

that the accused who pleads guilty does so because he or she is indeed factually guilty – and miscarriages of justice occur.

Appellant Ruiz is not in the same situation as was John Brady. Brady had been tried, convicted of a robbery-murder, and sentenced to death before he was put on notice that his cohort Boblit had made extra-judicial statements admitting the actual killing at issue. Those statements had been in the hands of the prosecutor the whole time. *Brady*, 373 U.S. at 85. That situation impressed this Court sufficiently to issue its landmark decision.

Brady obligations cannot be limited to trial situations. In no way should the Court diminish the meaning of *Brady*, for a critical component of the *Brady* rule that applies to sentencing requires prosecutors to disclose favorable evidence to the accused before sentencing. Relieving prosecutors of the duty to provide *Brady* material when a conviction results from a guilty plea rather than a trial directly contravenes this Court's holding that the *Brady* rule applies not only to the guilt phase but also to the sentencing phase of a criminal case.

II. *Brady* Defines the Prosecution's Obligation to the Judiciary and to Individual Accuseds Concurrently, Providing an Element of Constitutional Due Process That Cannot Be Waived by the Individual Alone.

This Court's decision in *Brady v. Maryland* was clearly rooted in the notion that as a representative of the sovereign, and a member of the executive branch, the prosecutor embodies the ideal of the achievement of justice in constitutionally created and regulated courts. Indeed, as the Court reasoned its way to the rule enunciated in *Brady*, it made reference to the role prosecutors play in criminal case adjudications, going so far as to quote former Solicitor General Sobeloff's views on the Government's obligation to see that justice is done in the courts. *Brady*, 373 U.S. at 88 n. 2. The view that the prosecutor is obligated to see that justice is done had been accepted by the Court even prior to *Brady*. See, e.g., *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935). It is clear that the very ethics of the prosecutor's professional practice require that he or she adhere to the *Brady* rule rather than seek a waiver of it from an accused, especially where *Brady* material is known to exist.

In issuing its ruling in *Brady*, this Court was plainly concerned with the legal basis on which a reviewing court would have the power and ability to correct miscarriages of justice when a prosecutor has withheld certain types of material information not only from the defense but also from the adjudicative process. As the Court noted, the duty of disclosure exists "to ensure that a miscarriage of justice does not occur." *Bagley, supra*, 473 U.S. at 676. The judiciary's interest in this maintenance of

integrity occurs in part because of the recognition that:

> [T]he prosecutor's role transcends that of an adversary; he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Bagley, supra, 473 U.S. at 676 n. 6 (citing *Berger*, supra, 295 U.S. at 88).

In sum, *Brady* disclosures are required by an over-riding concern for the integrity of our adversary system. Such disclosures cannot therefore be subject to waiver. Justice Vanderbilt put it as follows:

> It is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of our courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.

Arthur T. Vanderbilt, *The Challenge of Law Reform* 4-5 (Princeton University Press 1955).

Additional support for the proposition that "*Brady* waivers" should not be legitimized comes from case law that defines the duty of disclosure as continuing through post-conviction proceedings. This Court has made it clear that the obligation of prosecutorial disclosure

follows a case through the trial court into the reviewing courts.

> [A]fter a conviction the prosecutor is also bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.

Imbler, supra, 424 U.S. at 427 n.25. See also *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992).

Indeed, the significance of certain facts in the hands of the Government may not become known until the post-conviction review. In *People v. Garcia*, 17 Cal.App.4th 1169; 22 Cal.Rptr.2d 545 (1993), a California Court of Appeal reviewed a *Brady* violation that had occurred during negotiation to resolve a case that had been tried once, reversed on appeal, and remanded. The omission alleged was a failure to disclose information material to the credibility of a government expert.

Garcia had been convicted of crimes committed in an automobile at his first trial in part on the strength of testimony by a Highway Patrol expert who had testified about speed reconstruction calculations. It was discovered by prosecutors that the expert was incorrect in his approach to these calculations in a number of cases, including Garcia's. By the time Garcia's case was remanded, prosecutors were aware that the expert "was no longer being used as an accident reconstruction expert because of faults and improper calculations." Id. at 1175. Moreover, they were aware of several cases in which the purported expert's work had been reviewed and found wanting. All of this had come to the attention of both the

trial-level and appellate-level prosecutors during an investigation into the expert's veracity. Garcia, however, was not so informed, and negotiated a stipulated sentence rather than face retrial.

After the plea and sentencing, Garcia's post-conviction counsel became aware of the depth of the problem when the information concerning the expert surfaced in other cases. He then filed for habeas relief asserting that Garcia had negotiated a settlement with prosecutorial agencies that knew full well the depth of the errors and the breadth of impeachment available, but had not honored their obligations of disclosure. They withheld the information while negotiating a deal under which Garcia would be re-sentenced and would waive further appeal or collateral attack on the conviction. Id. at 1178.

The reviewing court found that the prosecutors were aware of exculpatory evidence bearing on the credibility of the expert. The court concluded that the errors and impeachment known to the Government were central and warranted habeas relief. The court was guided by this Court's rulings, including the observation made in *Agurs, supra*, 427 U.S. at 110-11, that there are situations "in which the evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." Id. at 1181. Based on the *Brady* violation, the sentence and conviction were both vacated. Id.

Garcia is especially instructive here. On remand, Mr. Garcia was offered a settlement of his case premised on his willingness to waive his rights of review, but without waiver of the State's *Brady* obligation. Assuming,

arguendo, that such a *Brady* waiver had been exacted, the question is how the prejudicial omission of disclosure would have been addressed. *Brady* is rooted in the view that the State must avoid the presentation of falsity at trial, and encourages the avoidance of the fraudulence that occurred in *Garcia*. Essentially, the prosecutor entrapped Mr. Garcia into pleading guilty without disclosures, and permitted a sentencing court to accept a criminal case settlement, and pronounce sentence, in the absence of facts that had a bearing on the integrity of the conviction.

CONCLUSION

Given that the overwhelming majority of criminal cases nationwide are resolved through guilty pleas, one objective should be to avoid the perception, or worse yet, the reality of the derisive description of criminal courts by the controversial humorist Lenny Bruce: "In the Halls of Justice, the only justice is in the halls." *People v. Garcia*, supra, illustrates a simple point. The prosecutor's obligations of disclosure do not exist merely so that the defendant can play the game; rather, they exist to ensure the process is fair.

Respectfully submitted,

JOHN T. PHILIPSBORN
Counsel of Record
Law Offices of John T. Philipsborn
507 Polk Street, Suite 250
San Francisco, CA 94103
(415) 771-3801

Counsel for *Amicus Curiae* CACJ

DAVID M. PORTER
Co-Chair, NACDL
Amicus Committee
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

Of Counsel